

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

AGRI PROCESS INNOVATIONS, INC.,

Appellant-Respondent,

v.

ENVIROTROL, INC.,

Respondent-Appellant.

DOCKET NUMBER WD72403
(Consolidated with WD72658)

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: April 5, 2011

APPEAL FROM

The Circuit Court of Buchanan County, Missouri
The Honorable Weldon C. Judah, Judge

JUDGES

Division II: Mitchell, P.J., and Ellis and Howard, JJ.

CONCURRING.

ATTORNEYS

Gary J. Barrett
Little Rock, AR

Attorney for Appellant-Respondent,

Greg T. Spies and Mikki L. Copeland
Kansas City, MO

Attorneys for Respondent-Appellant.



MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

AGRI PROCESS INNOVATIONS, INC.,)

Appellant-Respondent,)

v.)

ENVIROTROL, INC.,)

Respondent-Appellant.)

OPINION FILED:

April 5, 2011

WD72403 (Consolidated with WD72658)

Buchanan County

Before Division II Judges:

Karen King Mitchell, Presiding Judge, and
Joseph M. Ellis and Victor C. Howard, Judges

This is an agency case. The issue on appeal is whether the trial court erred in failing to submit to the jury the issue of whether the alleged agent acted within the scope and course of his alleged agency with the defendant. We hold that it did so err and that it therefore correctly granted the defendant's motion for a new trial. Accordingly, we affirm. The issue on cross-appeal is whether the trial court should have granted the defendant's motion for judgment notwithstanding the verdict in that, as a matter of law, the alleged agent lacked the authority to bind the defendant. We hold that a reasonable juror could have found that the alleged agent had apparent authority sufficient to bind the defendant. Accordingly, we affirm.

AFFIRMED

DIVISION II HOLDS:

Appellant-Respondent Agri Process Innovations, Inc. ("Agri Process") entered into an agreement with Allen Hoover for installing ceramic insulation on bio-diesel fuel tanks. The only aspect of the contract that is relevant to this appeal is whether Respondent-Appellant Envirotrol, Inc. ("Envirotrol") was bound by the agreement. Agri Process sued Envirotrol for breach of contract and pled that Hoover, in entering into and performing under the contract, had acted as Envirotrol's agent.

The circuit court held a jury trial on Agri Process's claims. The verdict directing instruction, given over Envirotrol's objection, did not require the jury to find that Hoover acted within the scope and course of his agency with Envirotrol. The trial court overruled Envirotrol's objection. The jury returned a verdict for Agri Process. The trial court granted Envirotrol's motion for a new trial, finding that it had submitted the verdict directing instruction in error.

"An instruction authorizing a verdict must require a finding of all ultimate facts necessary to sustain the verdict except those which have been unmistak[ab]ly conceded by both parties." *Young v. Kan. City Power & Light Co.*, 773 S.W.2d 120, 125 (Mo. App. W.D. 1989). It is error to submit an instruction that assumes or omits a controverted fact that is essential to the plaintiff's claim. *Id.* Here, whether Hoover acted within the scope and course of his alleged agency with Envirotrol was an "ultimate fact[] necessary to sustain the verdict." *Id.* Therefore, the instruction was erroneous in that it did not require the jury to find a necessary issue.

Agri Process argues that the trial court's error did not cause prejudice. First, it argues that the law was clear to the jurors because the court defined "scope and course of agency" in a separate instruction. But, the inclusion of the definitional instruction in this case did not cure the error, nor does it rebut the presumption of prejudice. Next, Agri Process argues that the law was clear to the jurors because Envirotrol's lawyer "was allowed to explain the law during closing arguments, several times." Argument by counsel is no substitute for proper direction from the trial court. Envirotrol was entitled to a factual finding on the agency issue, and the trial court prejudiced Envirotrol by not requiring the jury to make one.

On cross-appeal, Envirotrol argues that the trial court erred in denying its motion for judgment notwithstanding the verdict in that Agri Process judicially admitted that the subject contract contained no promise from Envirotrol. Since the trial court was not required to give conclusive effect to Envirotrol's interpretation of the response, and since there was sufficient evidence that Hoover acted with apparent authority sufficient to bind Envirotrol, we deny Envirotrol's point on cross-appeal.

Both parties were entitled to a submission of the agency issue. Therefore, the trial court erred neither in granting the motion for a new trial nor in denying the motion for judgment notwithstanding the verdict. Accordingly, we affirm.

OPINION BY: Karen King Mitchell, Presiding Judge

April 5, 2011

* * * * *

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.